

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the Court of Appeals

NATIONAL WILDLIFE FEDERATION &  
UPPER PENINSULA ENVIRONMENTAL  
COUNCIL,

Plaintiffs-Appellees,

V

No. 121890

CLEVELAND CLIFFS IRON COMPANY &  
EMPIRE IRON MINING PARTNERSHIP

Court of Appeals  
No. 232706

Defendants-Appellants,

Marquette County Circuit Court  
No. 00-037979-CE

AND

MICHIGAN DEPARTMENT OF  
ENVIRONMENTAL QUALITY, and  
RUSSELL J. HARDING, Director of  
the Michigan Department of Environmental  
Quality,

Defendants.

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BRIEF ON APPEAL OF JOSEPH L. SAX AS *AMICUS CURIAE*  
IN SUPPORT OF THE PLAINTIFFS-APPELLEES

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STATE OF MICHIGAN  
IN THE SUPREME COURT

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No. 121890

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National Wildlife Federation & Upper Peninsula Environmental Council,  
*Plaintiffs-Appellees*

v.

Cleveland Cliffs Iron Company & Empire Iron Mining Partnership,  
*Defendants-Appellants*

and

Michigan Department of Environmental Quality, and Russell J. Harding, Director,  
*Defendants*

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Brief of Joseph L. Sax as  
*Amicus Curiae* in Support  
of the Plaintiffs-Appellees

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*Amicus Curiae* submits this brief pursuant to a motion for leave filed with the Clerk of the Court.

**SUMMARY OF ARGUMENT**

The Court has granted leave to appeal limited to the issue whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing.

The standing to sue authority granted in the Michigan Environmental Protection Act (MEPA) does satisfy the judicial test for standing articulated by the Court, and does not “imperil the constitutional architecture” of the Michigan Constitution, as demonstrated by several constitutional provisions—Article 3, § 8; Article 6, § 13; and Article 9, § 32—in addition to Article 4, § 52. MEPA was designed to respond to the sort of problems that had been shown to arise from the widespread use of persistent contaminants like DDT, which demonstrated that resource

damage is fully executed long before we experience it in daily experience and activity. The law was for that reason structured to address damage to the state's natural resources that generate the sort of widespread injury to the public that scientific and economic research has identified as "passive use" or "standby values" which are real, present, serious, and capable of injury. The Michigan Constitution permits the legislature to grant standing for injuries suffered by the public broadly and does not require special injury.

## **ARGUMENT**

### **I. THE QUESTION ON WHICH THE COURT HAS GRANTED LEAVE TO APPEAL**

The Order poses the question whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing, citing the 2001 decision in *Lee v Macomb Cty Bd of Comm'rs*, 464 Mich 726, 629 NW2d 900 (2001). This brief is presented to assist the Court in assessing whether the standing conferred by MEPA does indeed satisfy the judicial test for standing set out by this Court in *Lee*. The underlying question, as set out in the *Lee* case, is whether the standing the legislature granted in MEPA "would imperil the constitutional architecture" of the Michigan Constitution. 464 Mich 735. In the recitation that follows, I hope to show that MEPA was designed and structured to fit squarely within the architecture of the Constitution of 1963, which had only recently been adopted, and whose provisions were well-known to those involved in the effort that led to the enactment of MEPA.

### **II. THE BACKGROUND WHICH LED TO MEPA**

In 1962, the scientist Rachel Carson published *Silent Spring*. First serialized in the *New Yorker Magazine*, it became perhaps the best-known and most widely-read book about the environment ever written in America. Among its most striking examples was that persistent

pesticides such as DDT were having long delayed and long-term impacts on bird populations. Such consequences were dramatically experienced by Michigan residents. Years of spraying elm trees with pesticides to prevent Dutch Elm disease had finally decimated robin populations, literally producing the silent Spring Carson wrote about. A group of scientists from the Brookhaven National Laboratory and the State University of New York at Stony Brook had formed a scientific committee to demonstrate the effects of DDT and other chlorinated hydrocarbon pesticides, and to try to get the state and local governments to cease using them. That committee would later develop into the Environmental Defense Fund, and become a membership organization. The scientists engaged an attorney, and first brought a lawsuit against the Suffolk County (N.Y.) Mosquito Control District, *Yannacone v Dennison*, 285 NYS2d 476 (Sup Ct 1967). It failed, with the court rejecting the claim of a duty to preserve the local natural resources. “Plaintiff’s right to protection”, the judge said, was “too nebulous...to warrant intervention.” *Id.* at 474.

Following the failure of the Suffolk County suit, a prominent and well-to-do Michigander, the founder of the Kalamazoo Nature Center, invited the scientists to come to Michigan and make another effort to obtain legal control over the use of DDT and a similar product, Dieldrin, that was being used here. Again a suit was brought (on the use of Dieldrin), extensive scientific evidence was adduced, but again the legal case failed. *EDF Inc v Ball*, 11 Mich App 693, 162 NW2d 164 (1968). The decision to use pesticides, the court held, “is one of discretion left to the wisdom and judgment of the Michigan State department of agriculture.” *Id.* at 695.

In frustration, the unsuccessful litigants asked me if I could help them draft a law that would integrate Rachel Carson’s scientific legacy into the law. Because our modern Constitution contained an environmental protection mandate, I responded that I believed Michigan was a good place in

which to propose legislation designed to implement contemporary scientific understanding of environmental harms, and to obtain legal redress where a case of environmentally destructive activity could be made out.

### **III. THE STRUCTURE OF MEPA: EXECUTING ARTICLE 4, SECTION 52 OF MICHIGAN'S CONSTITUTION**

The MEPA bill expressly incorporated the language and phraseology of the Constitution—"protection of the air, water and other natural resources of the state"—and added, "the public trust in natural resources," a concept already established in Michigan law. *Obrecht v. Nat'l Gypsum Co*, 361 Mich 399, 105 NW2d 143 (1960). It did so intentionally in order to reflect, as U.S. Supreme Court Justice Kennedy was later to put it, "the articulation of [a] new right[] of action that [did] not have clear analogs in our common-law tradition" by the legislature. *Lujan v. Defenders of Wildlife*, 504 US 555, 580, 112 S Ct 2130, 119 L Ed 2d 351 (1992) (concurring opinion). The idea was to create a new right of action, but to make sure that the right of action being created was in pursuance of purposes recognized in the Constitution. Article 4, § 52 of the Constitution, stating that "the legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction," had created a mandate to the legislature to ascertain the scope, nature, and remediation needed to protect the state's natural resources. MEPA is the legislature's response to the charge of Article 4, § 52. It is an act of constitutional compliance, *Petition for Highway US-24 v Vanderkloot*, 392 Mich 159, 166, 183, 220 NW2d 416 (1974).

In light of the Dieldrin case decision noted above, and its conclusion that pesticide regulation was under the existing law left solely to the wisdom of the Agriculture Department, it can hardly be surprising that implementation of the Constitution's conservation provision was thought to call

for a means by which members of the public could initiate action and seek remedies for harm to natural resources. Moreover, the nature of the pesticide experience, where ongoing conduct set in motion a chain of long-term persistent and adverse impacts, indicated a need to focus on protection of the resources themselves from contamination, rather than waiting until particular adverse impacts were experienced, or were imminent. The DDT/Dieldrin cases had made clear how environmental degradation commonly works. We were learning that to have birds it is necessary at the outset to prevent the buildup of pesticides in the species that birds eat; to have ducks and other huntable waterfowl over time it is necessary to maintain wetlands presently; and to have species such as salmon it is necessary to keep coastal streams currently available for passage, rather than waiting to experience the long-term injurious consequences of dams. In all such settings, where long-term, and non-reversible type conduct is involved, the critical injurious act occurs when the pesticide is applied or the dam is constructed, not when the species can no longer be found by those seeking to see, use or enjoy it.

Having been asked to draft legislation, and after consultation with those in the scientific community who had initiated the pesticide cases, I tried to focus on the fact that such environmental injury most commonly occurs to the public at large, and that it occurs at the time that impermissible pollution, impairment, or destruction occurs. That was the factual understanding of the reality that undergirded MEPA, as presented to the legislature in the form of numerous meetings with the relevant committees, and in a series of public hearings across the state.

I set to drafting a bill after consultation with Professor William Pierce, also of the Michigan Law faculty, who at that time headed the legislative program of the Commission on Uniform State Laws, and who urged enactment of the bill in meetings with Representative Anderson's Committee on Conservation and Recreation, and subsequently in testimony he gave. The role of Professor

Pierce, then perhaps the nation's foremost authority on legislative drafting, is significant because Dr. Pierce was also an advisor to the Michigan Constitutional Convention, and was expressly consulted on the meaning of Article 4, § 52 at the time of the Convention in 1961. His strong support of MEPA evidences his expert view that MEPA was compatible with the architecture of the 1963 Constitution, 2 Official Record, Constitutional Convention 1961, p 2602.

The bill garnered unusually extensive public interest, and was widely covered in the press, not only in Michigan but nationally. The legislature held five heavily-attended hearings, in Lansing and in Grand Rapids, Macomb County, and Kalamazoo. The bill's enactment was supported by the Attorney General and the State Department of Natural Resources, as well as by a wide range of citizen organizations, including the Junior League of Grand Rapids, the Young Republicans of Kent County, the Parent-Teachers Association, the League of Women Voters, and the Young Lawyers of the Michigan Bar Association, as well as by the Michigan United Conservation Clubs, and the United Auto Workers.

Governor William Milliken called for enactment of the legislation in practically every public speech he made during this period. Following votes in the Democrat-majority House (98-3) and Republican-majority Senate (20-18), the bill was enacted and signed by Governor Milliken on July 27, 1970. The law's adoption brought Michigan legislators—in particular Representative Anderson—into a national leadership position. Tom Anderson was invited to make presentations in a number of states, as lawmakers around the nation during the ensuing decade sought models for modernizing environmental law in other states.

The bill drew heavily on the understanding of scientists about the nature of environmental injury. Today, of course, it is well understood that as members of the public people have valuable interests in the maintenance of natural resources against pollution, impairment and destruction; that

they are willing to pay for the safeguarding of those interests; that such interests can be injured when the resources are first contaminated or impaired; that the injury can be valued; and that harm to such entitlements is a remediable injury. MEPA as drafted and as interpreted to the legislature back in 1970 adopted this then-relatively-new understanding of what constituted environmental injury, and the path by which it was caused, and incorporated this understanding as its implementation of Article 4, § 52.

What the Michigan legislature did in 1970 was to put in place legislation like that which Justices Kennedy and Souter had in contemplation when—in providing the concurring votes needed to create a majority in *Lujan*—they opined that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” 504 US 580.

The technical term economists use to define the interests members of the public hold in the immanent protection of natural resources against pollution, impairment, or destruction is “passive use” or “standby value.” Such interests have been verified by economic research and endorsed by Nobel Prize-winning economists. *See, eg, General Electric Co v US Dept of Commerce*, 128 F3d 767, 772 (DC Cir 1997). Damages can be assessed for these “option and existence values, assuming resources may never be visited or used but recognizing standby value to their existence . . . . [I]ndividuals assign value to resources ‘even if they never plan to make active use of them.’” *Nat’l Ass’n of Mfrs v US Dept of the Interior*, 134 F3d 1095, 1112 (DC Cir 1998). These natural resource damage cases, built upon economic theory of loss, illustrate why a statutorily authorized citizen suit establishing a legal entitlement, and dealing with legally determined unacceptable impairment of productive natural resources, is not just a “generalized grievance[.]” about law enforcement, *Lee, supra*, at 734), but can be the subject of a specific suit claiming redress for current transgression of

the claimant's passive use or standby value rights, where a legislature is empowered to recognize them, and has done so legislatively. That Michigan's legislature has so acted is what the history of MEPA explains.

Needless to say, the contemporary scientific and economic terminology had not yet come into use thirty-five years ago, when MEPA was in the process of becoming law. But these yet-to-be-articulated concepts underlay the explanations by scientists of the way in which pollutants such as persistent pesticides functioned and affected individuals, and how people were injured by such impacts. These were the concepts that led to MEPA via the proposal for "recogniz[ing] the public right to a decent environment as an enforceable legal right; [and] to make it enforceable by private citizens suing as members of the public." Sax, *Defending the Environment*, p 248. As the natural resource damage cases cited above explain, federal law allows damages to be recovered for losses such as destruction of assimilative capacity, and it establishes trustees of the resources who alone can seek such recovery. Michigan's legislature took a different path, vesting authority to seek redress in the general public which actually sustains the injury to passive use and standby values, an approach which, as indicated hereafter, fits Michigan's quite different constitutional architecture.

#### **IV. MEPA AND MICHIGAN'S CONSTITUTIONAL ARCHITECTURE**

While MEPA was, as Justice Kennedy put it in *Lujan, supra*, the articulation of a new right of action that had no analog in the common-law tradition, it was developed in the setting of the Michigan Constitution, which in various ways confirmed the constitutional propriety of a very broadly-based standing provision to enforce a right vested in the public. For example, Article 9, § 32 of the Constitution expressly authorizes taxpayer standing for specified purposes, providing "[a]ny taxpayer of the state shall have standing . . . to enforce the provisions of . . . this Article . .

. .” Nor is the permissible scope of standing only that expressly set out in the Constitution. “In Michigan, the common law bar on taxpayer suits has [also] been relaxed by statute.” *Waterford School Dist v State Bd of Education*, 98 Mich App 658, 652, 296 NW2d 328 (1980).

Article 3, § 8, of the Constitution also empowers the Supreme Court to issue advisory opinions, as contrasted with the case or controversy requirement in the federal constitution, which underlies restrictions on standing under the federal system. As this Court has observed, that is a “notable distinction between federal and state standing analysis.” *House Speaker v State Administrative Bd*, 441 Mich 547, 560, 495 NW 539 (1993). Authority to issue advisory opinions, like taxpayer standing, indicates that recourse to the courts is not constitutionally limited to claims where the claimant is differently affected than the general public, and this is the case notwithstanding the Court’s desire to be sparing in the use of its advisory powers. *In re Request for Advisory Opinion*, 402 Mich 83, 260 NW2d 436 (1977).

The Michigan Constitution further authorizes the courts to “issue, hear and determine prerogative and remedial writs,” such as mandamus. Const 1963, art 6, § 13. Such writs, according to tradition, may be brought by one seeking to vindicate the public interest, and not simply by those who suffer special injury. As a recent article in the Michigan Law Review points out, under traditional English precedent “in the seventeenth and eighteenth centuries, such writs, like mandamus, was available in England, even at the behest of strangers . . . a colonial lawyer might well have concluded that mandamus was capable of issuance at the suit of a stranger who sought to assert the public interest . . . . The mandamus action is closely related to the modern citizen suit . . . most conspicuously in the environmental area.” Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries”, and Article III*, 91 Mich L Rev 163, 171-72 (1992). Indeed, the first Michigan pesticide case brought prior to MEPA, mentioned earlier, *EDF Inc v Ball*, *supra*, was instituted as

a writ of mandamus in the Court of Appeals, where such suits had to be brought at that time, prior to the revision of the Judicature Act in 1976.

Notably, the Court's decisions on standing reflect concern about maintaining the separation of powers mandated under the Constitution. That was the situation in previous cases before this Court. For example, where a court, not acting under legislative direction, takes upon itself a role that assertedly belongs to another branch, a separation of powers issue can properly arise. That was the circumstance in the leading cases where the Court has denied standing on constitutional grounds. Neither *House Speaker v. State Administrative Board*,<sup>2</sup> *supra*, nor *Lee*,<sup>3</sup> *supra*, involved a statute expressly granting broad standing, as MEPA does. Strikingly, in *Lee*, the Court spoke of judicial usurpation: it spoke of the need to be "vigilant in preventing the judiciary from usurping the powers of the political branches."

Suits under MEPA, on the contrary, raise no question of judicial usurpation. MEPA cases do not involve courts taking it upon themselves to allow new types of standing. On the contrary, MEPA is the implementation of an expressly granted power by the legislature. Nor does it involve legislative usurpation of the constitutional structure, which allows taxpayer standing, advisory opinions and prerogative writs. And the legislative enactment of MEPA is consistent with long-established and traditional forms of state standing, which allows citizen suits to enforce the public nuisance law, which I specially called to the legislature's attention in my 1970 testimony.

As the Court pointed out in *House Speaker*, *supra*, that case involved the classic separation of powers situation, where representatives of one branch of government (the legislature, in the guise of individual legislators) sought to get the courts to resolve their dispute with another branch of government (the executive). That is the paramount separation of powers situation where courts traditionally refuse to get involved. Nothing of that sort is involved in MEPA cases. Where those

concerns are not in issue, and where there has been a specific grant of standing, as the Court found in the case of *House Speaker v Governor*, 443 Mich 560, 506 NW2d 190 (1993), the Court has affirmed standing, though suit was brought on behalf of a very broad category of plaintiffs.

## V. SPECIAL INJURY

This Court's standing cases regularly include a statement to the effect that the plaintiff's substantial interest must be detrimentally affected in a manner different from the citizenry at large. *Eg, House Speaker v State Administrative Bd, supra* at 554; *Lee, supra* at 733. This standing consideration appears to function as an indicator to aid the Court's deliberations in cases where there is no statute expressly granting standing. In light of constitutional provisions such as Article 3, § 8; Article 6, § 13; and Article 9, § 32—all of which permit actions where there is no special injury—special injury must only be a prudential, and not a constitutional, requirement. In neither of the above-cited cases was there a statutory grant of standing, as there is under MEPA, granting standing similar to that in taxpayer cases. It was already clear by the time of MEPA's enactment that much environmental litigation would be initiated by interest groups, such as the nascent Environmental Defense Fund that pioneered the DDT cases. As noted above, the Court has recognized standing without special injury in *House Speaker v. Governor, supra* at 572, to a group organized for civic, protective or improvement purposes with a special concern on the issue, where standing was authorized by a court rule.<sup>1</sup> Such group interest was exactly the situation in the Dieldrin case that served as the model for MEPA.

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<sup>1</sup> Even if special injury were thought to be constitutionally necessary, and even if special organizational interest as in *House Speaker v Governor, supra*, were thought insufficient to sustain standing under MEPA, the plaintiffs in a MEPA case would qualify as assignees of the State's cause of action, similar to the plaintiffs in *qui tam* cases, whose standing has been upheld in Justice Scalia's opinion for the U.S. Supreme Court in *Vermont Agency of Natural Resources v United States*, 529 US 765, 773-74, 120 S Ct 1858 (2000).

When I testified on H.B. 3055 before the House Committee on Conservation and Recreation on January 21, 1970, I called to the legislators' attention the following (which is excerpted from longer testimony, all of which is collected in the archive on MEPA that I deposited in the University's Bentley Historical Library) :

The idea of citizens suing to protect the public interest is not a novelty at all. Michigan itself has long permitted citizens to sue "in the name of the State of Michigan" on behalf of the public to enjoin certain kinds of public nuisances like houses of prostitution and gambling dens [\*]. The principle of the public suit is well established and it might be asked whether that principle might not more needfully be applied to the conservation of our resources than to prostitutes and gamblers [ then citing similar laws in Wisconsin and Florida]. ...

The right of citizens to sue on behalf of the general public has been recognized in a wide range of situations and the concept is receiving new approval with greatly increasing frequency. In Massachusetts citizens have been allowed to sue to protect Walden Pond, parks, reservations, and natural areas against highways, parking lots, and other destructive commercial encroachments. The Supreme Judicial Court of Massachusetts said they had standing "to enforce a public duty of interest to citizens generally." ...

It is also relevant to understanding the legislative background of MEPA that a very prominent public trust case was working its way through the California courts precisely at the time the MEPA legislation was being drafted, and a central question in that case was whether members of the public, without a special injury, would have standing to initiate public trust litigation. I had discussed the lower court opinion in a Michigan Law Review article I was writing at the same time that MEPA was in draft, *The Public Trust Doctrine in Natural Resources Law*, 68 Mich L Rev 473, 530-31 (1970), and the California Supreme Court referenced the article in its opinion holding that

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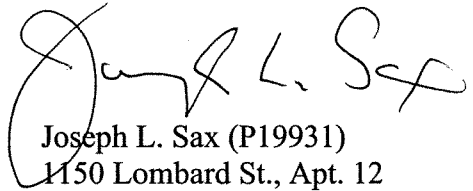
\*[MCL 600.3805: "... any citizen of the county[] may maintain an action for equitable relief in the name of the state of Michigan, . . . to abate said nuisance, and to perpetually enjoin any person . . ."]

one had standing “as a member of the general public” to assert the public trust in the waters of the state. *Marks v. Whitney*, 6 Cal3d 251, 261 257 n.4 (1971). The recognition of standing of members of the public in public trust cases in a prominent state Supreme Court decision was urged by me as a basis for including the public trust as an appropriate element in the MEPA draft. Such standing was meant to grant members of the public the opportunity to implement the public values given constitutional status in Article 4, § 52 of the Constitution, and that had been affirmed in the Supreme Court’s leading public trust case. *Obrecht, supra*.

### **CONCLUSION**

Nothing in the Michigan Constitution prohibits the legislature from granting broad standing, as it did in MEPA. Not only is MEPA an appropriate implementation of Article 4, § 52, but at least three other constitutional provisions demonstrate that the constraints implicit in the federal Constitution’s case or controversy requirement do not constrain the will of the Michigan legislature. MEPA is entirely compatible with Michigan’s constitutional architecture. Because the will of the legislature is explicit and unmistakable in MEPA, neither do the decisions of this court in previous cases, where no such specific grant of standing exists, cast doubt on the constitutionality of MEPA. Because MEPA’s constitutionality is clear, it should be sustained. Because MEPA represents one of the most fully considered, broadly supported, bi-partisan, laws that the state has enacted in modern times; because it reflects an internationally-recognized pioneering act of this state at the forefront of environmental protection; and because it has functioned usefully for nearly thirty-five years, there is reason for the Court to be unstinting and unambiguous in sustaining and pronouncing MEPA’s legitimacy.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph L. Sax". The signature is fluid and cursive, with the first name "Joseph" being more prominent and the last name "Sax" being more compact.

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